

TELONE PVT LTD
v
BIGBOY SENGENDE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & GOWORA JA
HARARE, MAY 21, 2015

J Dondo, for the appellant

J Bamu, for the respondent

ZIYAMBI JA:

[1] The question which fell to be determined in this appeal is whether, on a correct interpretation of s 12B (3) (b), of the Labour Act [*Chapter 28:01*] (“the Act”), the respondent was unfairly dismissed. Subsection (3) provides as follows:

- (3) An employee is deemed to have been unfairly dismissed —
- (a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;
 - (b) if, on termination of an employment contract of fixed duration, the employee—
 - (i) had a legitimate expectation of being re-engaged; and
 - (ii) another person was engaged instead of the employee.

[2] The respondent was employed by the appellant on a fixed term contract for a period of two years from 30 March 2009 to 29 March 2011. Before the expiry of the contract it was renewed for a further year until 31 March 2012. Clause 9 of the renewal contract provided:

“The renewal of this contract is entered into with no guarantee of long term employment or any expectation of any further renewals.”

During that year the respondent worked with a student on attachment named Mapepa. It is common cause that following the completion of a year on attachment, Mapepa was given a one year contract operative from 2 March 2012.

[3] On 26 March 2012, the respondent was advised by the appellant that his contract would not be renewed further. The respondent was dissatisfied and caused the dispute, in due course, to be placed before an arbitrator. The arbitrator found

- that by placing the respondent on continuous fixed term contracts the appellant had ‘casualised labour’;
- that the job in question was of a permanent nature and that the respondent ought to be reinstated as a permanent employee;
- that the clause to the contrary contained in the contract was of no consequence;
- that the student who was given a contract for a year had effectively replaced the respondent;

In view of the above it was the arbitrator’s finding that the appellant had violated the provisions of s 12B (3) (b) set out above. He ordered the reinstatement of the respondent to his post without loss of salary; and that the appellant confirm his position as permanent. In the alternative, the parties were to agree on damages in lieu of reinstatement failing which they were to approach the arbitrator for quantification of the said damages.

[4] The appellant, aggrieved by the arbitral award, appealed to the Labour Court. That court dismissed the appeal holding that a clause such as the one set out above was a ploy to circumvent

the provisions of s 12B (3) (b) of the Act and ought to be ignored. It accordingly upheld the award. Still dissatisfied, the appellant appealed to this Court.

WHETHER THE RESPONDENT WAS UNFAIRLY DISMISSED

[5] As is clear from the legislative provision¹, the employee who alleges that his dismissal should be deemed unfair must show:

that he had a contract of fixed duration;
that he had a legitimate expectation to be re-engaged; *and*
that another employee was engaged in his stead².

The first requirement is common cause between the parties. It is mentioned here only to draw attention to the fact firstly, that contracts of fixed duration are part of our Labour law and the adoption of that type of contract is a prerogative of the employer; and, secondly, that the contract of fixed duration is the basis of the legitimate expectation sought to be enforced by the respondent. If there is no contract of fixed duration the issue of legitimate expectation does not arise. It is therefore a contradiction to state that the respondent had a legitimate expectation to be re-engaged and at the same time find that the contract of fixed duration is an abuse of authority or casualization of Labour as put by the arbitrator and the Labour Court respectively. For in terms of subs (3) (b) there can be no legitimate expectation without a contract of fixed duration.

[6] Section 12 of the Act makes specific provision for employment contracts of fixed duration. It provides:

12 Duration, particulars and termination of employment contract (1) ...

¹ S12B(3) supra

² UZ-UCSF COLLABORATIVE RESEARCH PROGRAMME IN WOMEN'S HEALTH V SHAMUYARIRA 2010(1) ZLR 127(S)

- (2) An employer shall, upon engagement of an employee, inform the employee in writing of the following particulars—
- (a) the name and address of the employer;
 - (b) **the period of time, if limited, for which the employee is engaged;**
 - (c) ...

The Labour court therefore erred in upholding the arbitrator's ill-advised description of such contracts, which are a clear exercise of a right conferred by the Act, as an abuse of authority.

LEGITIMATE EXPECTATION

[7] The respondent was offered, and accepted, a renewal of the contract on the understanding that the renewal would not create an expectation of further renewals³. Prior to the renewal for one year his contract had been renewed once and for a period of two years. This was therefore a second renewal for a shorter period. It is difficult to see how, in these circumstances, he could have a legitimate expectation to be re-engaged. I agree with counsel for the appellant that no legitimate expectation was shown by the respondent to exist. That should be the end of the matter because that finding, on its own, is fatal to the respondent's case. However, since it was argued before us, I proceed to determine the third leg of the enquiry.

WHETHER ANOTHER WAS EMPLOYED IN THE RESPONDENT'S STEAD

[8] From the record it is not shown what was the nature of the work in which the respondent was engaged nor was it established in what manner he had been supplanted by another employee. His complaint that Mapepa had been employed in his stead was not substantiated. What appears on the record is that on 1 March 2012, the Human Resources Officer recommended that Mapepa should be given a one year contract from 5 March 2012 to 28 February 2013 to 'take up a position left by Kuimba who transferred to Warren Park last year'. (My underlining). Kuimba had sought a transfer from Masvingo to Harare for personal reasons. Mapepa, who had been

³ UZ-UCSF (supra) ; Kundai MAGODORA & ORS V CARE INTERNATIONAL ZIMBABWE SC24/14

working as a student on attachment together with the respondent at the Masvingo station, was subsequently given a one year contract in terms of the recommendation. This occurred before the expiry of the respondent's contract. Thus from the evidence on the record Mapepa was to replace Kuimba. The respondent provided no evidence as to the nature of his employment or that of Mapepa. There was thus no basis for the finding by both the arbitrator and court *a quo* that Mapepa was employed in his stead.

[9] It follows from the above that the respondent did not establish that he was unfairly dismissed.

[10] Accordingly, the Labour Court erred in upholding the award of the Arbitrator.

[10] It is for the above reasons that after hearing the parties, the Court ordered as follows:

“1. The appeal is allowed with costs.

2. The judgment of the Labour Court is set aside and substituted with the following:

‘The appeal is allowed with costs.

The award of the Arbitrator is set aside’”.

GARWE JA: I agree

GOWORA JA: I agree

Dondo & Partners, appellant's legal practitioners

Tamuka Moyo Attorneys, respondent's legal practitioners